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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D Noland, Jr., et al.,

13 Defendants.  
14

No. CV-20-00047-PHX-DWL

**ORDER**

15 Pending before the Court is a Rule 24 motion to intervene filed by a group of 710  
16 individuals (“Proposed Intervenors”) (Docs. 274, 312), as well as the Proposed  
17 Intervenors’ motion to expedite disposition (Doc. 307). For the reasons stated below, the  
18 motion to intervene is denied and the motion to expedite disposition is granted.

19 **BACKGROUND**

20 **I. Overview Of Parties, Claims, And Proposed Parties**

21 This case concerns the business activities of Success By Health (“SBH”), which is  
22 “an affiliate-marketing program that sells coffee products and other nutraceuticals through  
23 its online platform and network of affiliates.” (Doc. 106 at 1-2.) Plaintiff Federal Trade  
24 Commission (the “FTC”) asserts, among other things, that SBH is an illegal pyramid  
25 scheme and that James Noland, Lina Noland, Thomas Sacca, and Scott Harris (together,  
26 the “Individual Defendants”) have made false statements to SBH’s affiliates. (Doc. 3.)

27 The Proposed Intervenors are SBH affiliates. (Doc. 274 at 1, 16-23 ¶¶ 1-101; Doc.  
28 312.) As discussed below, a great deal of litigation activity has already occurred in this

1 case, much of it with the involvement of SBH affiliates, including the Proposed  
2 Intervenor.

3 II. Relevant Procedural History

4 On January 8, 2020, the FTC initiated this action. (Doc. 3.) That same day, the  
5 FTC moved for an *ex parte* temporary restraining order (“TRO”) (Docs. 7, 8), which the  
6 Court substantially granted (Docs. 19, 38).<sup>1</sup> In the TRO, the Court appointed Kimberly  
7 Friday (the “Receiver”) to serve as the receiver of SBH and affiliated entities. (Doc. 38 at  
8 16.)

9 On January 17, 2020, the FTC filed an amended complaint. (Doc. 35.)

10 On February 6, 2020, the Individual Defendants filed their answer to the FTC’s  
11 amended complaint. (Doc. 70.)

12 On February 10, 2020, the Receiver issued an initial report concluding that she  
13 “does not believe that the business can be operated without violating the TRO. The  
14 inaccurate marketing statements, the organization of the commission system, and the  
15 movement of large amounts of cash to the insiders strongly suggests that the business is  
16 structured in such a fashion that prevents Affiliates from realizing the promoted business  
17 opportunities.” (Doc. 82-1 at 19.)

18 On February 12, 2020, the preliminary injunction hearing took place. (Doc. 86.)  
19 After the hearing, the Court took the matter under advisement. (*Id.*)

20 On February 18, 2020, the Individual Defendants filed an amended answer to the  
21 FTC’s amended complaint. (Doc. 93-1.)

22 On February 27, 2020, the Court issued an order granting the FTC’s motion for a  
23 preliminary injunction. (Doc. 106.) Among other things, this order authorized the  
24 Receiver to resume selling SBH’s existing inventory of products. (*Id.* at 28.)

25 On May 12, 2020, the Receiver issued her second report. (Doc. 139-1.) Among  
26 other things, she reported that her efforts to resume selling SBH’s existing inventory had  
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28 <sup>1</sup> The TRO was later amended. (Docs. 20, 21.) The final, unsealed version of the  
TRO was filed on January 17, 2020. (Doc. 38.)

1 been delayed by the COVID-19 pandemic and by her discovery that SBH had been  
2 operating without liability insurance, had been neglecting to collect sales tax, and had been  
3 using an ingredient that is illegal in the United States. (*Id.* at 4-6.) She further reported  
4 that product sales finally resumed during the week of May 11, 2020, that she had  
5 “terminated the multi-level marketing program and the commission structure” that had  
6 previously been in place, and that she had informed SBH’s affiliates “that they will not  
7 earn commissions or otherwise benefit from their purchases or purchases by individuals  
8 formerly in their downline.” (*Id.* at 7-8.)

9       On July 28, 2020, the Individual Defendants sought to compel the joinder of roughly  
10 4,500 additional parties to this action under Federal Rule of Civil Procedure 19. (Docs.  
11 167, 167-1.) Most or all of the proposed parties were SBH affiliates, many of whom are  
12 now among the 710 Proposed Intervenor. (Doc. 167 at 1-2; Doc. 167-1 at 2, 4; Doc. 167-  
13 2 at 2-3, 5, 7, 9, 11; Doc. 284 at 16.) The Court denied the motion because it was filed  
14 after the Individual Defendants filed their first responsive pleading. (Doc. 200 at 5-8.)

15       On August 12, 2020, the Receiver filed her third report. (Doc. 179-1.) The Receiver  
16 reported that restarting SBH product sales was complicated by difficulties with payment  
17 processing companies. (*Id.* at 4.) This led to a delay in sales until June 19, 2020, at which  
18 point sales resumed using a new payment processing company. (*Id.*) She stated that sales  
19 were “steady if not voluminous.” (*Id.*) She offered products at a ten percent discount to  
20 encourage sales, particularly for products that had impending expiration dates. (*Id.* at 5.)  
21 She added that she had received a total of \$255,140.83 in refund requests, and \$20,976.80  
22 in commission payment requests, and that the number of each type of request had declined  
23 in the prior three months. (*Id.* at 10-11.) She also noted her appreciation for James  
24 Noland’s “substantial assistance” with technological and sales tax issues. (*Id.* at 5.)

25       On September 22, 2020, after briefing from the parties, the Court granted leave to  
26 the FTC to file a second amended complaint (“SAC”). (Docs. 182, 193, 198, 204.) The  
27 next day, the FTC filed the SAC. (Doc. 205.)

28       On October 19, 2020, the corporate defendants, represented by the Receiver,

1 answered the SAC. (Docs. 217, 218.)

2 On October 23, 2020, the Individual Defendants answered the SAC. (Doc. 222.)

3 On November 12, 2020, the Receiver issued her fourth report. (Doc. 229-1.)  
4 Among other things, she noted a downward trend in product sales. (*Id.* at 2-3.) She also  
5 determined that, “[g]iven the regulatory uncertainties on the federal level, and the  
6 patchwork of state statutes and regulations with varying restrictions and requirements, . . .  
7 sale of [SBH’s] dietary supplements containing CBD is not a prudent business decision.”  
8 (*Id.* at 3-4.) She reported that she was in regular contact with SBH affiliates, who generally  
9 contacted her about product orders or the status of this case, while requests for refunds and  
10 commission payments continued a downward trend. (*Id.* at 8.)

11 On December 23, 2020, fact discovery in this case closed. (Doc. 211.)

12 On February 5, 2021, the deadlines for expert disclosures for both parties as well as  
13 rebuttal experts expired. (*Id.*)

14 On February 12, 2021, the Receiver filed her fifth report. (Doc. 271-1.) Among  
15 other things, she reported a continued overall downward trend in product sales, as well as  
16 frequent contact from affiliates, who largely seek information regarding product orders or  
17 updates on this action, with only a few seeking refunds or commission payments. (*Id.* at  
18 4-6.)

19 On February 18, 2021, the Proposed Intervenors filed their motion to intervene.  
20 (Doc. 274.) The Proposed Intervenors wish to intervene as a class, seek a declaratory  
21 judgment that the FTC’s litigation of this action has violated their rights to association,  
22 contract, and to receive the benefits of their contracts with SBH, and also seek an injunction  
23 preventing the FTC from depriving them of the same. (Doc. 274 at 2-3, 28-31 ¶¶ 133-52.)

24 On March 11, 2021, the Proposed Intervenors’ motion became fully briefed. (Docs.  
25 282, 284.)

26 On March 12, 2021, the dispositive motions deadline passed. (Doc. 211.) That day,  
27 the FTC filed a motion for summary judgment as to liability. (Docs. 285-302.)

28 ...

### 1 III. SBH Affiliates' Involvement In Earlier Stages Of The Litigation

2 From the litigation of the preliminary injunction onward, over 100 SBH affiliates  
 3 have submitted over 300 unique declarations in support of the Individual Defendants'  
 4 numerous motions and responsive briefing. (Doc. 282-1 at 1-2 ¶ 2-3.) This includes 41  
 5 signed declarations from SBH affiliates in opposition to the FTC's motion for preliminary  
 6 injunction. (*Id.* at 1 ¶ 2.) There is some overlap between the affiliates who have previously  
 7 filed sworn declarations in this case and the Proposed Intervenors. (*Id.* at 1-2 ¶¶ 2, 5.)

8 Some of the Proposed Intervenors have also contributed financially to the Individual  
 9 Defendants' legal defense. (*Id.* at 3 ¶ 7.)

10 Since the commencement of this case, the Court has also received countless personal  
 11 letters from SBH affiliates expressing their support for the Individual Defendants and the  
 12 SBH enterprise and their discontent with the FTC, the Receivership, and these proceedings.

## 13 DISCUSSION

### 14 I. Legal Standard

15 "Rule 24 recognizes two types of intervention: (1) intervention of right; and (2)  
 16 permissive intervention. Courts must permit intervention of right, but may permit or deny  
 17 permissive intervention." 1 Gensler, Federal Rules of Civil Procedure, Rules &  
 18 Commentary, Rule 24, at 716 (2021). The Proposed Intervenors seek to intervene under  
 19 both theories.

20 Intervention of right is available to anyone who "claims an interest relating to the  
 21 property or transaction that is the subject of the action, and is so situated that disposing of  
 22 the action may as a practical matter impair or impede the movant's ability to protect its  
 23 interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).  
 24 Courts in the Ninth Circuit employ a four-part test when analyzing intervention of right:

25 (1) the motion must be timely; (2) the applicant must claim a "significantly  
 26 protectable" interest relating to the property or transaction which is the  
 27 subject of the action; (3) the applicant must be so situated that the disposition  
 28 of the action may as a practical matter impair or impede its ability to protect  
 that interest; and (4) the applicant's interest must be inadequately represented  
 by the parties to the action.

1 *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra*  
 2 *Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). These requirements are broadly  
 3 construed because “a liberal policy in favor of intervention serves both efficient resolution  
 4 of issues and broadened access to the courts.” *Id.* (citation omitted). That said, “[f]ailure  
 5 to satisfy any one of the requirements is fatal to the application,” and the Court “need not  
 6 reach the remaining elements if one of the elements is not satisfied.” *Perry v. Proposition*  
 7 *8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

8 Permissive intervention, on the other hand, is available “on timely motion” to  
 9 “anyone . . . who . . . has a claim or defense that shares with the main action a common  
 10 question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). “[A] court may grant permissive  
 11 intervention where the applicant for intervention shows (1) independent grounds for  
 12 jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or defense, and the main  
 13 action, have a question of law or a question of fact in common.” *United States v. City of*  
 14 *Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002) (citation omitted). “The district court is  
 15 given broad discretion to make this determination.” *Perry v. Schwarzenegger*, 630 F.3d  
 16 898, 905 (9th Cir. 2011).

## 17 II. Analysis

18 The Proposed Intervenors argue that all the factors governing both forms of  
 19 intervention are satisfied here. (Doc. 274 at 6-12.) The FTC opposes the motion, arguing  
 20 that the Proposed Intervenors lack Article III standing to pursue the claims they seek to  
 21 advance through intervention, their motion is untimely, and the remaining intervention  
 22 factors are not satisfied. (Doc. 282 at 6-15.)

### 23 **A. Timeliness**

24 In determining the timeliness of a motion to intervene, courts consider “three  
 25 factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the  
 26 prejudice to other parties; and (3) the reason for and length of the delay.” *League of United*  
 27 *Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (internal quotation marks  
 28 omitted). “[T]he crucial date for assessing the timeliness of a motion to intervene is when

1 proposed intervenors should have been aware that their interests would not be adequately  
 2 protected by the existing parties.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th  
 3 Cir. 2016). The same three timeliness factors apply to requests for intervention as of right  
 4 and permissive intervention. *Wilson*, 131 F.3d at 1308. “In the context of permissive  
 5 intervention, however, [courts] analyze the timeliness element more strictly than . . . with  
 6 intervention as of right.” *Id.* “[A]ny substantial lapse of time weighs heavily against  
 7 intervention.” *Id.* at 1302 (internal quotation marks omitted).

#### 8 1. Stage Of The Proceeding

9 This case began over thirteen months before the Proposed Intervenors filed their  
 10 motion. The intervening period was jam-packed with litigation activity. For example, the  
 11 Court issued a TRO. After substantial litigation and briefing that included declarations  
 12 from SBH affiliates, some of whom are among the Proposed Intervenors,<sup>2</sup> the Court also  
 13 issued a preliminary injunction. The FTC twice amended its complaint and the defendants  
 14 answered each amendment. The Individual Defendants attempted, without success, to join  
 15 many of the Proposed Intervenors as parties pursuant to Rule 19. Fact discovery opened  
 16 and closed. And the Receiver filed five reports documenting the status of SBH’s sales and  
 17 her ongoing interactions with SBH affiliates, including her efforts to meet their refund and  
 18 commission payment requests.

19 These events, as well as the others recounted at length in the background section of  
 20 this order, are only some of the key milestones that occurred before the Proposed  
 21 Intervenors filed their motion. The parties have actively litigated this case. Other relevant  
 22 orders that have come after full briefing from the parties—often with the benefit of sworn  
 23 statements from the Proposed Intervenors<sup>3</sup>—include: (1) an August 8, 2020 order denying  
 24 the Individual Defendants’ motion to release one of the corporate defendants from the  
 25 Receiver’s control (Doc. 177); (2) an October 27, 2020 order granting in part and denying

26 <sup>2</sup> See, e.g., Doc. 85-1 at 2; Doc. 283-1 at 1; Doc. 85-1 at 10; Doc. 274 at 15-16, 19  
 27 ¶¶ 33-35, 31; Doc. 85-1 at 13; Doc. 274 at 15-16, 20-21 ¶¶ 57-59, 31; Doc. 85-1 at 24; Doc.  
 274 at 15-16, 18 ¶¶ 21-23, 31.

28 <sup>3</sup> See, e.g., Doc. 187-5 at 2; Doc. 274 at 15-16, 20 ¶¶ 51-56, 31; Doc. 187-5 at 26;  
 Doc. 283-1 at 1.

1 in part the Individual Defendants’ motion to amend their answer and assert counterclaims  
 2 (Doc. 223); (2) an October 27, 2020 order denying the Individual Defendants’ motion to  
 3 dissolve or modify the preliminary injunction (Doc. 224); (4) a November 13, 2020 order  
 4 granting in part and denying in part the Individual Defendants’ motion for relief regarding  
 5 one of their travel enterprises (Doc. 231); (5) a December 3, 2020 order denying the  
 6 Individual Defendants’ motion to stay proceedings (Doc. 242); and (6) a December 10,  
 7 2020 order denying Jeffrey and Amber Wright’s (who are among the Proposed  
 8 Intervenors<sup>4</sup>) motion to quash a third-party subpoena to their bank (Doc. 248).

9 The Proposed Intervenors’ motion thus comes far too late. Other courts have denied  
 10 motions to intervene as untimely under analogous circumstances. *See, e.g., Wilson*, 131  
 11 F.3d at 1303 (affirming denial of motion to intervene due to its untimeliness, where  
 12 “complaints had been filed,” the “court had issued a temporary restraining order, and  
 13 subsequently a preliminary injunction,” “defendants had filed an answer,” and “the district  
 14 court and the original parties had covered a lot of legal ground together,” because such  
 15 developments “weigh[ed] heavily against allowing intervention as of right under Rule  
 16 24(a)(2)”); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 474-75 (6th Cir. 2000) (motion  
 17 untimely where “discovery was closed, the experts were producing their reports,” and “the  
 18 dispositive motion deadline . . . was only seven weeks away”); *Cal. Dep’t of Toxic*  
 19 *Substances Control v. World Cleaners, Inc.*, 2017 WL 4769439, \*1 (C.D. Cal. 2017)  
 20 (“[T]he issue was only brought to the Court’s attention . . . after discovery had closed  
 21 . . . . A potential intervenor is not allowed to sit on its rights for the entire litigation to see  
 22 how things turn out and then move at the late stages of the case for a ‘do-over.’”).

23 The timing of this intervention motion also contrasts sharply with cases where  
 24 intervention was found to be timely. *See, e.g., Droplets, Inc. v. Yahoo! Inc.*, 2019 WL  
 25 9443778, \*4 (N.D. Cal. 2019) (intervention timely where the case was “still in its relatively  
 26 early stages,” *i.e.* the court had not “addressed the merits of any party’s substantive claims  
 27 or defenses” or “set a discovery or expert report deadline”); *Sage Electrochromics, Inc. v.*

28 <sup>4</sup> See Doc. 274 at 15-16, 17 ¶¶ 9-11; Doc. 283-1 at 2.

1 *View, Inc.*, 2013 WL 6139713, \*2 (N.D. Cal. 2013) (intervention timely where the case  
 2 was “still in its relatively early stages” and the court had not yet “addressed the merits of  
 3 any party’s substantive contentions, and [had] not yet even [] set a final case schedule”).

4 Accordingly, the stage-of-proceeding factor weighs heavily against a finding of  
 5 timeliness.

## 6 2. Prejudice

7 “[P]rejudice to existing parties is the most important consideration in deciding  
 8 whether a motion for intervention is untimely.” *Smith*, 830 F.3d at 857 (internal quotation  
 9 marks omitted). Intervention may be prejudicial to other parties where it “would  
 10 complicate the issues and prolong the litigation,” *United States v. Washington*, 86 F.3d  
 11 1499, 1504 (9th Cir. 1996), or where “a lot of water has passed under the litigation bridge.”  
 12 *United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004). However, prejudice  
 13 cannot be based solely on “the fact that including another party in the case might make  
 14 resolution more difficult.” *Smith*, 830 F.3d at 857.

15 The Proposed Intervenors argue that the FTC “cannot be prejudiced by this Court  
 16 considering the perspective of . . . consumers regarding SBH’s conduct, as well as the effect  
 17 of these proceedings on those consumers, when the FTC asserts its claims are ostensibly  
 18 based on an interest in protecting the consumers.” (Doc. 274 at 8.) They also point out  
 19 that, in the FTC’s response brief, “the FTC does not even assert that it would be prejudiced”  
 20 by intervention. (Doc. 284 at 5.)

21 It is true that the FTC didn’t explicitly state that it would be prejudiced by  
 22 intervention. Further, the Proposed Intervenors state that they do not intend to conduct any  
 23 additional discovery and are amenable to an expedited schedule for taking discovery  
 24 against them should such discovery be sought by the existing parties. (Doc. 284 at 5.)  
 25 Nevertheless, and as discussed in more detail below, the Proposed Intervenors appear to  
 26 seek Rule 23 class certification to pursue a novel avenue of declaratory and injunctive relief  
 27 in the final stages of a civil FTC enforcement action. (Doc. 274 at 15-31.) This will  
 28 necessarily “inject new issues into the litigation that at this late date would prejudice the

parties.” *Alisal Water Corp.*, 370 F.3d at 922. Although the increased difficulty of resolving the litigation cannot alone constitute prejudice, the Court finds that the proposed intervention comes at a sensitive time in the case, as discovery has closed and a summary judgment motion has already been filed. Moreover, the Proposed Intervenors do not adequately explain how injecting their proposed Rule 23 class certification (Doc. 274 at 28-29 ¶¶ 133-44) or reviewing the FTC’s civil enforcement action under 5 U.S.C. § 702 (Doc. 274 at 30 ¶ 146) while its outcome is still undetermined would *not* result in prejudice to the parties’ ability to resolve this case.

For these reasons, the prejudice factor weighs against a finding of timeliness (or, at most, is neutral).

### 3. The Reason For And Length Of The Delay

The Proposed Intervenors assert in conclusory fashion that they “acted promptly after their rights were affected by this case.” (Doc. 274 at 8.) Elsewhere in their motion, however, they acknowledge their keen awareness of the “numerous motions and applications” that have purportedly “negatively affected the rights of SBH of affiliates,” including the TRO (issued in January 2020), the preliminary injunction (issued in February 2020), and the FTC’s filing of the SAC (in September 2020). (*Id.* at 7.) Additionally, in their reply, they contend that September 21, 2020, when the Court denied the Individual Defendants’ motion to dismiss or compel joinder under Rule 19, was when they first had any “basis upon which to believe that the Court would decline to require or permit their direct, active participation in this action.” (Doc. 284 at 5.)

There is simply no good explanation for the Proposed Intervenors’ massive delay in requesting intervention. According to the Proposed Intervenors, the earliest date on which their protected interests arose was January 13, 2020 (issuance of TRO) and the latest was September 21, 2020 (denial of Rule 19 motion). Their intervention motion, however, was not filed until February 18, 2021. (Doc. 274.) Thus, at the bare minimum, the Proposed Intervenors delayed nearly five months after their interests arose. As the FTC points out, this exceeds what courts have found to be an unjustifiable delay. *See, e.g., FTC v. Cardiff*,

2020 WL 766336, \*4 (C.D. Cal. 2020), *aff'd*, 830 F. App'x 844 (9th Cir. 2020) (delay of nearly two months after protected interest arose was untimely and “[a]ny purported ‘steps’ taken during that time period are insufficient to justify” the delay). Further, as noted, “any substantial lapse of time weighs heavily against intervention.” *Wilson*, 131 F.3d at 1302 (internal quotation marks omitted).

The Proposed Intervenor argue they have not been “dilatory” because it took them “just a few months” to get organized, retain counsel, and file the motion. (Doc. 274 at 9; Doc. 284 at 5.) But this hardly explains why, after months of active, and at times contentious, litigation, in which several of the Proposed Intervenor themselves participated, it was only in September 2020 that they could even begin to get organized. After all, at least some of the Proposed Intervenor have been aware of the effects of the TRO, preliminary injunction, and other aspects of this litigation from the outset. For example, in opposing the preliminary injunction, among the exhibits proffered by the Individual Defendants were declarations by SBH affiliates, at least sixteen of whom rank among the Proposed Intervenor. (Doc. 282-1 ¶ 2. *See, e.g.*, Doc. 85-1 at 2; Doc. 283-1 at 1; Doc. 85-1 at 10; Doc. 274 at 15-16, 19 ¶¶ 33-35, 31; Doc. 85-1 at 13; Doc. 274 at 15-16, 20-21 ¶¶ 57-59, 31; Doc. 85-1 at 24; Doc. 274 at 15-16, 18 ¶¶ 21-23, 31.) In addition, in her May 12, 2020 report, the Receiver stated that she had spent the previous three months “communicating with affiliates and consumers regarding requests for refunds and the status of litigation” after “widely distributing her email address and phone number.” (Doc. 139-1 at 3, 8.) These regular communications have reportedly continued ever since. (Doc. 179-1 at 10-11; Doc. 229-1 at 8; Doc. 271-1 at 4-6.) “A party *must* intervene when he knows or has reason to know that his interests might be adversely affected by the outcome of litigation.” *Alisal Water Corp.*, 370 F.3d at 923 (emphasis added). The record shows that many of the Proposed Intervenor knew or had reason to know about their interests in this litigation as early as January or February 2020, one year before they moved to intervene.

Accordingly, the reason-and-length-of-delay factor weighs strongly against a finding of timeliness.

1                   4.     Balancing

2             Because the first and third factors weigh strongly against a finding of timeliness,  
3 while the second factor weighs somewhat against a finding of timeliness (and is at most  
4 neutral), the motion to intervene is untimely.

5             B.     **Other Considerations**

6             Because the Proposed Intervenor's motion is untimely, the Court "need not reach  
7 any of the remaining elements of Rule 24." *Wilson*, 131 F.3d at 1302. Nor does the Court  
8 reach the FTC's argument that the Proposed Intervenor's lack standing because they cannot  
9 assert an interest in an unlawful pyramid scheme. (Doc. 282 at 10-11.)<sup>5</sup>

10            The Court notes, however, that the Proposed Intervenor's request is highly unusual  
11 and perhaps unprecedented. The Proposed Intervenor's do not cite any precedent, nor did  
12 the Court uncover any in its own research, for nonparties to intervene in an FTC  
13 enforcement action while proceeding as a putative class.

14            Courts have tended to deny requests by nonparties to intervene in FTC enforcement  
15 actions. *See, e.g., FTC v. Johnson*, 800 F.3d 448, 450-51 (8th Cir. 2015). As the FTC  
16 points out, there is a "presumption that the United States, as a government litigant, is  
17 adequately protecting" its constituents' interests. *United States v. City of Los Angeles*, 288  
18 F.3d 391, 402 (9th Cir. 2002). *See also Johnson*, 800 F.3d at 452 ("We presume that the  
19 government entity adequately represents the public, and we require the party seeking to  
20 intervene to make a strong showing of inadequate representation."); *FTC v. First Cap.*  
21 *Consumer Membership Servs., Inc.*, 206 F.R.D. 358, 364 (W.D.N.Y. 2001) ("[The  
22 adequate protection] standard changes when a government entity is a party and asserts its  
23 status as a guardian or representative of all of its citizens, as the FTC does here. In such a  
24 circumstance, the governmental entity deserves special consideration and deference as an  
25 adequate representative of the interests of would-be intervenors."). Here, those

26            <sup>5</sup>     The Court notes that in some FTC enforcement actions, nonparties who have  
27 suffered financial harm as a result of the action have been found to have Article III standing  
28 to intervene. *FTC v. Nudge, LLC*, 2020 WL 6881846, \*3 (D. Utah 2020) ("The injury they  
claim is the loss of monthly payments due to them . . . since the entry of the of the  
injunction in this case. This injury is neither speculative nor hypothetical . . .").

1 constituents include the Proposed Intervenor.

2 To be sure, this presumption has been overcome from time to time in FTC  
3 enforcement actions, such as in cases where the government's and proposed intervenor's  
4 interests were "diametrically opposed." *FTC v. Loss Mitigation Servs. Inc.*, 2009 WL  
5 10673186, \*4 (C.D. Cal. 2009). *See also FTC v. Nudge, LLC*, 2020 WL 6881846, \*5 (D.  
6 Utah 2020) ("The Sloans' objectives are not the same as the government agency plaintiffs  
7 in this case."). But in the few cases allowing such intervention that the Court was able to  
8 uncover through its own research (none were cited by the Proposed Intervenor), the scope  
9 of the requested intervention was quite narrow and involved a single non-party (or single  
10 married couple) challenging the FTC's plan to dispose of a particular asset. *See, e.g., Loss*  
11 *Mitigation Servs.*, 2009 WL 10673186 at \*2 (intervention granted so entity could pursue  
12 the claim that it was the true owner of a bank account containing just over \$175,000 that  
13 the court-appointed receiver "wrongly took possession of"); *Nudge*, 2020 WL 6881846 at  
14 \*3 (intervention granted so married couple could pursue the claim that restrained company  
15 should be allowed to continue making payments to them pursuant to a settlement agreement  
16 executed before the enforcement action arose). That is a far cry from what the Proposed  
17 Intervenor is requesting here—engrafting a 700+ member class action onto an FTC  
18 enforcement action, after discovery has already closed, so they can not only challenge the  
19 disposition of frozen assets but also challenge the FTC's discretionary decision to pursue  
20 an enforcement action against SBH in the first instance. (Doc. 274 at 4 ["Intervenor is  
21 prepared . . . to present to this Court their evidence that the FTC has misled the Court as to  
22 the nature of SBH's business model and disclosures to affiliates and as to the opinions and  
23 experiences of the affiliates who have actually operated under SBH's business model."]).

24 Intervention also may be denied under the "significantly protectable interest prong,"  
25 on the ground that it is not enough for a proposed intervenor to show "disruption to [his]  
26 business occurred as a direct result of the issuance of the temporary restraining order"  
27 because a "mere interest in property that may be impacted by litigation is not a passport to  
28 the litigation itself." *FTC v. PricewaterhouseCoopers LLC*, 2010 WL 94264, \*1 (N.D. Cal. 2010) (internal

1 quotation marks omitted). As the Ninth Circuit has observed, “[t]o hold otherwise would  
2 create a slippery slope where anyone with an interest in the property of a party to a lawsuit  
3 could bootstrap that stake into an interest in the litigation itself.” *Alisal Water Corp.*, 370  
4 F.3d at 920 n.3. Further, some courts have held that where property subject to an asset  
5 freeze and a preliminary injunction is being administered by a receiver, the proposed  
6 intervenor’s interests in those assets are adequately protected by the process established  
7 under the receivership—and, thus, there is no need to separately allow for intervention.  
8 *CFTC v. Rust Rare Coin Inc.*, 811 F. App’x 497, 500 (10th Cir. 2020).


9 At any rate, the Proposed Intervenors’ motion is denied because it is untimely.

10 Accordingly,

11 **IT IS ORDERED** that the Proposed Intervenors’ Rule 24 motion to intervene (Doc.  
12 274) is **denied**.

13 **IT IS FURTHER ORDERED** that the Proposed Intervenors’ motion to expedite  
14 disposition (Doc. 307) is **granted**.

15 Dated this 2nd day of April, 2021.

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20 Dominic W. Lanza  
21 United States District Judge  
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